IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE HARPER	:	
	:	CIVIL ACTION
v.	:	
	:	
	:	NO. 01-CV-0086
KENNETH D. KYLER, ET AL.	:	

SURRICK, J. **APRIL22, 2005**

MEMORANDUM & ORDER

Presently before the Court is Petitioner Lawrence Harper's Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (Doc. No. 1), Magistrate Judge Thomas J. Rueter's Report and Recommendation recommending denial of the Petition (Doc. No. 20), and Petitioner's Objections to the Magistrate Judge's Report and Recommendation (Doc. No. 23).[1] For the following reasons, we will overrule Petitioner's Objections and deny the Petition.

I. FACTUAL AND PROCEDURAL HISTORY

On December 21, 1992, Petitioner was convicted of murder in the first degree, robbery, and possession of an instrument of crime for the fatal shooting of Kevin Evans by a jury sitting in the Court of Common Pleas, Philadelphia County, and sentenced to life in prison. *Commonwealth v. Harper*, 660 A.2d 596, 597 (Pa. Super. Ct. 1995). At Petitioner's murder trial, the following facts were developed:

[1]Petitioner's Objections were duplicated in the docket as Document Numbers 23 and 24. We will refer to Document Number 23.

> Evans was exiting a restaurant when [Petitioner] snatched a gold chain from [Evans's] neck and then shot him in the head. [Petitioner] and another man were observed standing over Evans'[s] body, going through his pockets and then fleeing. [Petitioner] also attempted to flee from police when he was arrested several days later. . . . After closing arguments, the prosecutor requested a jury charge on accomplice liability. The court granted the request over [Petitioner's] objection. The jury returned a verdict of guilty on all counts and after a penalty hearing, [Petitioner] was sentenced to life in prison.

Id. The Commonwealth presented two witnesses to the murder. (N.T. 12/14/92.) Henry Blakely testified that he was across the street from the scene of the crime when he heard a gun shot and observed two men standing over the body of the decedent. (*Id*. at 64.) One of the men wore a waist-length black leather jacket and held a gun. (*Id*. at 65.) The other man wore a full-length Los Angeles Raiders coat. (*Id.*) Blakely saw the armed man in the leather jacket rifle through the victim's pockets. (*Id.* at 87.)

Noel Jackson testified that he was standing outside of the restaurant just prior to the shooting and observed Petitioner there when Evans approached. (N.T. 12/15/92 at 7.) Jackson knew both Petitioner and Evans. (*Id*. at 5.) As the victim entered the restaurant, Jackson watched Petitioner take a gun from his waistband and heard him declare, "I am going to kill that motherf---er." (*Id*. at 9.) Jackson began to walk away and as he was crossing the street, he heard a shot. (*Id*.) Jackson turned and saw Petitioner and a man he knew as Andre running toward him. (*Id.* at 15.) He testified that Petitioner had a gold chain in his hand and observed that Petitioner was wearing a black leather jacket. (*Id*. at 11, 13.)

Petitioner presented Carl Brooks, who testified that he was positioned across the street from the restaurant at the time of the shooting. (N.T. 12/16/92 at 104-05.) He testified to seeing two black males, one of whom wore a black coat with writing on the back, approach the victim,

attempt to rob him, and shoot him in the head. (*Id.* at 108.) Brooks identified the shooter as someone he knew as Ski-Bop. (*Id.* at 105.) He admitted that he did not like Ski-Bop, that Petitioner's family had brought him to court, that he was afraid of Petitioner's family, and that on the night of the incident, he did not tell the police who shot Kevin Evans because he was scared. (*Id* at 110-22.) Brooks had a fourth grade education and could not read or write.

After closing arguments, the prosecutor requested a jury charge on accomplice liability. The court granted the request over Petitioner's objection. The jury returned a verdict of guilty on all counts and, after the penalty phase, Petitioner was sentenced to life in prison.

Petitioner appealed to the Superior Court of Pennsylvania and raised two issues: (1) that the trial court erred in granting the Commonwealth's request for an accomplice liability charge because Petitioner was not provided sufficient notice of the request as required by Pennsylvania Rule of Criminal Procedure 1119(a); and (2) that Petitioner's trial counsel was ineffective because he did not object to the prosecutor's cross-examination of defense witness Brooks. *Harper*, 660 A.2d at 597. The Superior Court affirmed Petitioner's conviction and sentence on May 10, 1995. *Id.* On December 19, 1995, the Pennsylvania Supreme Court denied Petitioner's request for an allowance of appeal. *Commonwealth v. Harper*, 668 A.2d 1124 (Pa. 1995) (table).

On January 14, 1997, Petitioner filed a pro se motion under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-9546. The court appointed counsel, who then filed an amended petition. On December 31, 1998, the court dismissed the petition. *Commonwealth v. Harper*, June Term 1992, Nos. 1519, 1521, 1523, mem. op. at 1 (Pa. Ct. Com. Pl. Mar. 10, 1999). Petitioner appealed to the Superior Court of Pennsylvania, raising only one issue: "[W]hether trial and appellate counsel were ineffective by failing to object and

raise on appeal the trial court's erroneous jury instruction regarding accomplice liability." *Commonwealth v. Harper*, No. 335 EDA 1999, mem. op. at 3 (Pa. Super. Ct. Mar. 6, 2000). On March 6, 2000, the Superior Court affirmed the dismissal of the PCRA petition. *Commonwealth v. Harper*, 757 A.2d 992 (Pa. Super. Ct. 2000) (table). On September 26, 2000, the Pennsylvania Supreme Court denied Petitioner's request for allocatur. *Commonwealth v. Harper*, 766 A.2d 1244 (Pa. 2000) (table).

On January 8, 2001, Petitioner filed his Petition For Writ of Habeas Corpus. (Doc. No. 1.) In his Petition, he raises three claims:

> (1) Denial of adequate notice of accomplice liability theory by Commonwealth at trial, and insufficient evidence to support accomplice liability jury instruction; (2) [t]he conviction was based on an erroneous accomplice liability jury instruction by the trial court; (3) [d]enial of effective assistance of trial and appellate counsel for failing to object and pursue erroneous accomplice jury instruction by the trial court.

(Doc. No. 1 at 9-10.) The Petition was referred to Magistrate Judge Thomas J. Rueter for a Report and Recommendation.

On December 7, 2001, Magistrate Judge Rueter filed a Report and Recommendation, recommending that all of Petitioner's claims for relief be denied. (Doc. No. 20.) Judge Rueter determined that if one were to conclude that Petitioner's claim of inadequate notice and insufficient evidence concerning the accomplice liability instruction raised federal issues, they were unexhausted, procedurally defaulted, and petitioner had failed to show cause and prejudice or a fundamental miscarriage of justice. He also determined that the claim of an erroneous jury instruction on accomplice liability was never raised as either a state or federal issue and was therefore unexhausted, procedurally defaulted, and that a fundamental miscarriage of justice had

not been established. Finally, Judge Rueter concluded that Petitioner's ineffective assistance of counsel claim which was based on counsel's failure to protect against the erroneous accomplice jury instruction, although exhausted, lacked merit because counsel cannot be ineffective for failing to pursue a meritless claim. Petitioner filed the following Objections to the Report and Recommendation:

> 1. The Magistrate committed plain-error by finding that Petitioner never raised his second claim (Erroneous Accomplice Instruction) "in the state courts, either as a matter of state law or federal law" and is accordingly "unexhausted", which finding is belied by the available record within Petitioner's Brief for Appellant . . . and relied upon federal legal theory at page 17 [sic].
>
> 2. The Magistrate erred by finding the Petitioner's third claim (Ineffective Assistance of Counsel) was properly and correctly ruled upon by the Superior Court and meritless, where the Superior Court never addressed the Petitioner's mixed question of federal law, which was fairly presented to the appellate court in the Brief for Appellant at 24 [sic].
>
> 3. The Magistrate erred in it's [sic] Order entered December 10, 2001 which GRANTED [sic] Petitioner's Motion for Expansion of the Record, by not including copies of Petitioner's: Petition for Allowance of Appeal filed in the Supreme Court of Pennsylvania on direct & [sic] collateral appeals.

(Doc. No. 23 at 1-2.)

II. STANDARD OF REVIEW

Absent exceptional circumstances, a state prisoner is required to exhaust all avenues of state review of his claims prior to filing a petition for federal habeas review. 28 U.S.C. § 2254(b)(1) (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 839 (1999); *see also Toulson v. Beyer*, 987 F.2d 984, 986 (3d Cir. 1993) ("A state prisoner may initiate a federal habeas petition only after state courts have had the first opportunity to hear the claim sought to be vindicated."). The policy of the exhaustion requirement is rooted in the tradition of comity: the state must have

the "'initial opportunity to pass upon and correct'" alleged violations of a habeas petitioner's constitutional rights. *Picard v. Connor*, 404 U.S. 270, 275 (1971) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971)). A petitioner "shall not be deemed to have exhausted the remedies available . . . if he has the right under the law of the state to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c) (2000). In order for a claim to be exhausted, "both the legal theory and the facts underpinning the federal claim must have been presented to the state courts." *Evans v. Ct. of Com. Pl.*, 959 F.2d 1227, 1231 (3d Cir. 1992). The habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Toulson*, 987 F.2d at 987.

The exhaustion requirement does not apply, however, when "state procedural rules bar a petitioner from seeking further relief in state courts." *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000). In such cases, exhaustion is not possible because the state court would refuse to hear the merits of the claim on procedural grounds, and any attempt to assert the claims would be futile. *Id*. However, this does not mean that a federal court may, without more, proceed to the merits of a petitioner's claims. "Claims deemed exhausted because of a state procedural bar are procedurally defaulted." *Id.* Federal courts may not consider the merits of a procedurally defaulted claim unless "the petitioner 'establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default.'" *Id*. (quoting *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999)); *see also Dretke v. Haley*, 124 S. Ct. 1847, 1852 (2004) ("[W]e have recognized an equitable exception to the bar when a habeas applicant can demonstrate cause and prejudice for the procedural default."). Courts have defined "fundamental miscarriage of justice" as synonymous with "actual innocence." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992).

If a claim is exhausted, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), requires courts to employ a deferential, "reasonableness" standard of review to a state court's judgment on constitutional issues raised in habeas petitions. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 903 (3d Cir. 1999); *see also Lindh v. Murphy*, 521 U.S. 320, 334 n.7 (1997) (describing AEDPA's standard of review as "highly deferential" to state court determinations). A federal court may overturn a state court's resolution on the merits of a constitutional issue only if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000). The Supreme Court has adopted a two-part standard for analyzing claims under § 2254(d)(1), establishing that the "contrary to" and "unreasonable application of" clauses have independent meaning:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "[A] federal habeas court may not issue the writ [of habeas corpus] simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

This court must also apply a deferential standard to a state court's determination of facts. A state court's determination of a factual issue is "presumed to be correct," and may be rebutted

only by "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1) (2000). Habeas relief predicated on an alleged factual error will be granted only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2).

We review *de novo* those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b) (2000); Fed. R. Civ. P. 72(b); *see also Thomas v. Arn*, 474 U.S. 140, 141-42 (1985) ("[A] United States district judge may refer . . . petitions for writ of habeas corpus to a magistrate, who shall conduct appropriate proceedings and recommend dispositions. . . . [A]ny party that disagrees with the magistrate's recommendations 'may serve and file written objections' to the magistrate's report, and thus obtain *de novo* review by the district judge." (citations and footnotes omitted)).

III. DISCUSSION

A. Notice of and Evidence Supporting Accomplice Liability Jury Charge

Petitioner argues in his habeas Petition that he was denied adequate notice of the Commonwealth's "accomplice liability theory . . . at trial, and insufficient evidence to support accomplice liability jury instruction." (Doc. No. 1 at 9.) Petitioner states:

> Petitioner was found guilty after jury trial of 1st degree murder [sic], robbery and possession of an instrument of crime. There was no notice of an accomplice liability theory and a conspiracy charge filed in the initial criminal complaint was dismissed at the preliminary hearing due to insufficient evidence. There was no rearrest. After closing argument, the trial court sua sponte advised the DA he would not give the unrequested accomplice liability charge. The DA immediately asked for the charge, and over defense objection, the Court granted the instruction. Trial evidence showed two men were near Kevin Evans when he was shot and killed. One was the shooter who bent down and went through the victims [sic] pockets.

> No witness saw the other man do anything but stand near the shooter and leave. Advised only after closing argument, defense counsel was unable to argue the weakness of an accomplice liability theory. Petitioner was prejudiced because only one eyewitness, Noel Jackson, said Petitioner was the shooter. Testifying as an accused drug dealer, he was effectively impeached by trial counsel. Another witness, Henry Blakely, saw a man standing near the shooter but could not ID the Petitioner. The Commonwealth used Blakely's description of an Oakland Raider's [sic] jacket worn by the shooter to create a circumstantial ID of the Petitioner as the shooter which defense counsel impeached based upon a prior police statement where Blakely said the man wearing the jacket was not the shooter.
>
> The late accomplice liability charge was prejudicial because the jury could have had reasonable doubt that Petitioner was the shooter, yet still convict on first degree murder because he was "near" a man wearing an Oakland Raider's [sic] jacket.

(Doc. No. 1 at 9-9A.)[2]

As mentioned above, Judge Rueter concluded that Petitioner cannot assert these claims because "he never raised federal constitutional issues in the state courts," the claim is procedurally defaulted, and Petitioner "has failed to demonstrate cause for the default and actual prejudice or that the failure to consider the claims would result in a fundamental miscarriage of justice." (Doc. No. 20 at 4.) Petitioner has filed no objection to this determination. However, we note that Petitioner is acting pro se. Therefore, we will construe his submissions liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Out of an abundance of caution, we will review the denial of these claims, even though Petitioner did not specifically object.

Judge Rueter found that "[a]lthough [P]etitioner did raise the facts of his first claims to the state courts, he failed to argue that the facts amounted to a federal constitutional violation.

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[2]Petitioner also argues that "the trial Court's sua sponte raising of the issue, at a most inappropriate time, went beyond its role as fact-finder and adopted a role as an advocate for the Commonwealth." (Doc. No. 1 at 9A.) We find no merit to Petitioner's argument.

As a consequence, Petitioner has failed to satisfy the exhaustion requirement." (Doc. No. 20 at 5.) Judge Rueter is correct. The Supreme Court has stated that

> exhaustion of state remedies requires that petitioners "fairly present" federal claims to the state courts in order to give the State the "opportunity to pass upon and correct alleged violations of prisoners' federal rights." If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 366 (1995).[3]

Clearly, Petitioner only raised the lack of notice claim as violative of Pennsylvania Rule of Criminal Procedure 1119(a) and not as violative of federal law. (Appellant Br. at 13, direct appeal.) However, we observe that Petitioner's claims have no merit whether raised as state or federal claims. A review of the trial transcript reveals that while the Commonwealth focused on the Petitioner as the shooter, it is also clear that the witnesses offered by both parties testified to observing two males involved in the shooting and robbery of Kevin Evans. As early as the preliminary hearing, the participation of two people was discussed. In fact, Petitioner was initially charged with the crime of conspiracy as well as murder and robbery.[4] (Prelim. Hr'g Tr. 5/27/92 at 52.) At trial, Henry Blakely testified that he saw two men standing together over Evans's body. (N.T. 12/14/92 at 64.) Blakely described the two men and the directions in which they ran after the body was on the ground. (*Id.* at 64-65.) At one point, the Court intervened

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[3]We note that Petitioner was represented by counsel in his appeal before the state court.

[4]The conspiracy charge was dismissed at the preliminary hearing. However, this does not preclude a jury instruction on accomplice liability if the testimony at trial so requires.

stating, "[c]an we do this, too, Mr. Blakely, the man with the gun, let's call him number one, okay. . . and the other person who you said was taller, let's call him number two, okay?" (*Id.* at 67.)

Later in the trial, Noel Jackson testified that he saw "Shank [Petitioner] and Andre running down the street, and I seen the chain in his hand." (N.T. 12/15/92 at 10.) Jackson testified as follows:

> Q. Now you saw Andre?
>
> A. Yes.
>
> Q. Was Andre present with Shank at all outside the store earlier?
>
> A. Yes.
>
> . . .
>
> Q. What was Andre doing at the time Shank had the gun and switched it from one pocket to the next?
>
> A. Andre was standing in the store.

(*Id*. at 11.) During cross-examination, Jackson testified:

> Q. The person you saw with Shank, could you describe that person to the jury?
>
> A. He was about six two, weighed about 165 pounds, was brown-skinned; that is it.
>
> Q. What did that person have on?
>
> A. He had on a black leather jacket with orange designs on the back of it and a pair of jeans.
>
> Q. Was this a waist-length jacket?
>
> A. Yes.
>
> Q. Did you know this person?

A. Yes.

(*Id.* at 35.) In addition, Officer Miller related that a witness had told him that "there was another male" involved. (N.T. 12/16/92 at 75.) Detective Bova also testified that there were two people involved in the shooting. (N.T. 12/17/92 at 56.)

After a thorough examination of the record, it is clear that Petitioner was on notice from the time of his arrest and throughout the pretrial and trial proceedings that it was the Commonwealth's position that two people were involved in the murder of Kevin Evans. All of the evidence pointed to the involvement of two individuals. Accordingly, we are compelled to conclude that even if Petitioner's federal claims were not procedurally defaulted, the claim that he was not provided with adequate notice of the potential for accomplice liability and the claim that there was insufficient evidence to support a charge on accomplice liability are without merit.

B. The Erroneous Jury Instruction Ruling

Next, Petitioner asserts that Judge Rueter erred when he found that Petitioner's claim that his conviction was based on an erroneous jury instruction on accomplice liability was never raised as a matter of state or federal law. (Doc. No. 23 at 1.) Judge Rueter found that because Petitioner never raised this claim in the state courts as a matter of state or federal law, this claim was unexhausted. (Doc. No. 20 at 6.) Petitioner argues that he "abundantly listed the facts with specific and particular reference to the record to establish the basis for the alleged trial court's erroneous instruction." (Doc. No. 23 at 2.) Petitioner points to his PCRA brief before the Superior Court of Pennsylvania in support of his position. (*Id.*)

Petitioner framed his argument regarding the erroneous jury instructions in his PCRA

brief to the Superior Court in the context of an ineffective assistance of counsel claim. There is a circuit split on the issue of whether the prior exhaustion of an ineffective assistance of counsel claim likewise exhausts the underlying claim for purposes of habeas review. *Compare Odem v. Hopkins*, 192 F.3d 772, 775 (8th Cir. 1999) (holding that claim was exhausted by virtue of having been presented as an ineffective assistance of counsel claim in state courts), *and Ramdass v. Angelone*, 187 F.3d 396, 409 (4th Cir. 1999), *aff'd on different grounds*, 530 U.S. 156 (2000) (same), *with Wilder v. Cockrell*, 274 F.3d 255, 260-62 (5th Cir. 2001) (holding that presentation of ineffective assistance of counsel claim in state court did not serve to exhaust the underlying substantive claim). The Third Circuit has discussed this problem in several cases. In *Dooley v. Petsock*, 816 F.2d 885 (3d Cir. 1987), the Third Circuit observed that "[petitioner] has raised no due process claim before this court. . . . [Petitioner], as previously discussed, raised a Sixth Amendment claim of ineffective assistance of counsel. Although a due process claim might have arguable merit . . . such a claim has not been raised in the Pennsylvania courts, and therefore remains unexhausted." *Id.* at 889 n.3. In *Senk v. Zimmerman*, 886 F.2d 611 (3d Cir. 1989), in adjudicating a petitioner's ineffective assistance of counsel claim, the Third Circuit stated, "[petitioner's] contention that he is entitled to relief only indirectly implicates [his underlying claim,] as we are concerned with his attorney's performance and not simply the [underlying claim]." *Id.* at 614. Finally, in *Gattis v. Snyder*, 278 F.3d 222 (3d Cir. 2002), the Third Circuit stated:

> The District Court states that [petitioner] presented his argument to the Delaware Supreme Court as one of ineffective assistance of trial counsel, evidently concluding that that would be sufficient for exhaustion purposes. Aside from the fact that it would not be sufficient (because it involves a completely different legal theory), we do not see in the record where it was expressly presented to the

Delaware Supreme Court.

Id. at 237 n.6.

In a well-reasoned opinion in the recent case of *Veal v. Myers*, 326 F. Supp. 2d 612 (E.D. Pa. 2004), *appeal denied*, No. 04-3347 (3d Cir. Apr. 19, 2005), the District Court examined this issue of whether a habeas petitioner who raised a constitutional claim within an ineffective assistance of counsel claim in state court, but raised the claim independently before the habeas court, had exhausted the underlying constitutional claim. The Court stated:

> While it is true, in the abstract, that a court considering an [ineffective assistance of counsel] claim may never reach the underlying constitutional claim . . . this was not the case here. In other words, although it is entirely possible that the rejection of an [ineffective assistance of counsel] claim would not include any necessary ruling on the underlying claim, the opinion of the Pennsylvania Superior Court expressly stated that, in addressing [petitioner's ineffective assistance of counsel] claims under Pennsylvania law, the court is 'first required to determine whether the issue underlying the claim is of arguable merit. Unlike the federal courts in *Dooley*, *Senk* and *Gattis*, the Pennsylvania Superior Court did not engage in a form of analysis which assumed, arguendo, that the claim had merit, thus proceeding to analyze the reasonableness of counsel's behavior. Instead, the state court both began and ended its analysis with the merits, ultimately deciding that [petitioner's] claim of identification taint lacked any. Moreover, the Superior Court devoted several pages of its opinion to this analysis.

Id. at 621-22. Ultimately, the court concluded that, in light of the principles of comity and federalism, and our duty to "'safeguard the constitutional rights of state criminal defendants,'" *id.* at 622 (quoting *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990)), "to find that [petitioner] failed to exhaust his underlying claims in state court, when the state court devoted a substantial portion of its opinion to the merits of those claims, would be in derogation of the principles elucidated by AEDPA." *Id.* We agree with the District Court's analysis.

A close examination of Petitioner's briefing in the state courts and the state court

opinions reveals significant similarities between this case and *Veal*. In this case, Petitioner's PCRA brief in the Superior Court argued that "[a]ppellant Lawrence Harper was denied his federal and state constitutional rights to effective assistance of counsel where trial and appellate counsel failed to object to, and/or raise and preserve for appeal, the trial court's erroneous 'accomplice liability' jury instructions." (Appellant Br. at 17.) The brief specifically refers to the jury instructions and argues that the jury instruction on accomplice liability was erroneous because it "repeatedly and consistently misstated the law by advising the jury that it could convict Mr. Harper of murder in the first degree by finding that either he or an accomplice possessed the specific intent to kill." (PCRA Appeal Br. at 10-14.) The Superior Court addressed this claim, stating:

> Appellant contends trial counsel was ineffective for failing to object and appellate counsel for failing to appeal the court's jury instructions regarding accomplice liability. He claims the court's instruction failed to indicate that the accomplice himself must possess the specific intent to kill in order to be convicted of first degree murder.[1] We disagree. Relevantly, while instructing the jury, the trial court stated: "Now, for persons to be accomplices in committing or attempting to commit a felony, they must have a common design. In other words, a shared intent to commit that felony."
>
> [1] We note that counsel did object to the propriety of the court giving any instruction on accomplice liability and further voiced this concern in post-verdict motions. Further, the propriety of giving an accomplice liability instruction was raised on direct appeal. However, neither counsel raised this particular objection, which is whether the instruction itself was in error. Therefore, we review this claim.
>
> Upon the jury's request for additional instructions, the Court elaborated:
>
> > Members of the jury, you may find a defendant guilty of a crime without even finding that he personally performed the acts or engaged in the conduct that is required for the commission of that

> crime or even that he was personally present when the crime was committed.
>
> Now, a defendant is guilty of a crime if he is an accomplice of another person who commits that crime. More specifically, a person is an accomplice if, with the intent of promoting or facilitating the commission of the crime, he solicits, commands, or encourages or requests the other person to commit it or aids or agrees to aid or attempts to aid the other person in the plan or the committing of it.
>
> You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are first satisfied, beyond a reasonable doubt, that the crime, indeed, was committed and you are convinced, beyond a reasonable doubt, that the defendant was an accomplice of the person who committed it. . . .
>
> As I just told you, you have to find that the person, remember the language that I used with you, that the person participated, and as I said, a person is an accomplice if, with the intent of promoting or facilitating he, and I told you specific things he must actively participate, in the respect that I told you, in these matters, by way of soliciting or commanding or encouraging or requesting the other person to commit it and aiding or agreeing to aid or attempting to aid the other person in committing it.

> Clearly, these instructions indicate that both actors must possess the requisite intent to commit the act. Therefore, trial and appellate counsel cannot be deemed ineffective for failing to raise a meritless claim.

Harper, No. 335 EDA 1999, mem. op. at 4-6.

Accordingly, we are compelled to disagree with Judge Rueter. We conclude that Petitioner did exhaust this claim in the state court.

Having concluded that the claim of an erroneous jury charge was fairly presented to the

state courts for purposes of exhaustion, we now apply AEDPA's standard of review to Petitioner's erroneous jury instruction claim. As discussed above, under § 2254(d)(1), if a claim raised in a habeas petition "was adjudicated on the merits in State court proceedings," we may not grant the writ "unless the adjudication of the law . . . resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Petitioner argues that the jury instruction was erroneous because "the court's definition of the other degrees of murder and other crimes all included similar erroneous references to the 'defendant or accomplice' to permit the jury to find Petitioner guilty without a finding that he possessed the required intent." (Doc. No. 1 at 10.) The Superior Court correctly pointed out that the trial court stated directly that accomplices must have a shared intent to commit that felony. *Harper*, No. 335 EDA 1999, mem. op. at 4-5. Furthermore, when Petitioner filed his PCRA appeal, the Court of Common Pleas pointed out:

> With regard to the jury instruction, the Court's charge mirrored the Pennsylvania Standard Jury Instructions. Since the instruction adequately informed the jury of the mental state the defendant had to possess to be found guilty of murder and the statutory definition of accomplice liability, defendant's claim that it was improper is meritless.

Commonwealth v. Harper, June Term, 1992, Nos. 1519, 1521, 1523, at unnumbered 3 (Pa. Ct. Com. Pl. Mar. 10, 1999). We are satisfied that the Pennsylvania Standard Jury Instructions are not violative of federal law. Moreover, the trial court's charge read as a whole was perfectly proper. Accordingly, we conclude that the Superior Court's adjudication did not result in a decision that was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court and as required by 28 U.S.C. § 2254(d)(1).

C. The Ineffective Assistance of Counsel Claim

Petitioner next objects to Judge Rueter's finding that Petitioner's claim of ineffective assistance of counsel was addressed by the Superior Court of Pennsylvania and found to be meritless. (Doc. No. 23 at 2.) Petitioner argues that "the Superior Court never addressed the Petitioner's mixed question of federal law which was fairly presented to the appellate court in the Brief for Appellant at 24." (*Id*.)

Judge Rueter found, the Commonwealth concedes, and we agree, that Petitioner did exhaust the issue of ineffectiveness of counsel in the state courts. (Doc. No. 20 at 6-7.) The Superior Court directly ruled on the merits of this claim. The Court first set forth the three-prong test for establishing ineffectiveness of counsel. *Harper*, No. 335 EDA 1999, mem. op. at 3. It then explained that the first prong necessary to prove ineffectiveness is that the underlying claim is of arguable merit. *Id*. The Superior Court found that there was no merit to Petitioner's claim that the trial court failed to charge that accomplices must have an intent to commit the felony. It found that the trial court charged that accomplices must show a shared intent to commit the felony. *Id*. at 4-5. The Superior Court concluded that the trial and appellate counsel "cannot be deemed ineffective for failing to raise a meritless claim." *Id*. at 5-6. Judge Rueter agreed, as do we. *See United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999) ("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument."). Moreover, as stated above, the Superior Court's adjudication of the law did not result in a decision that was contrary to, or an unreasonable application of, clearly established

federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[4]

III. CONCLUSION

For the foregoing reasons, Petitioner's habeas Petition will be dismissed.

[4]Petitioner also includes in his Objections, "[t]he Magistrate erred in it's [sic] Order entered December 10, 2001, which GRANTED [sic] Petitioner's Motion for Expansion of the Record, by not including copies of Petitioner's Petition for Allowance of Appeal filed in the Supreme Court of Pennsylvania on direct & [sic] collateral appeals." (Doc. No. 23 at 2.) This issue is moot. This Court thoroughly examined Petitioner's briefing before the state court and the state court opinions.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE HARPER	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO. 01-CV-0086
KENNETH D. KYLER, ET AL.	:	

ORDER

AND NOW, this 22nd day of April, 2005, upon consideration of Petitioner's Petition for Habeas Corpus (Doc. No. 1, No. 01-CV-0086), the Report and Recommendation of Magistrate Judge Thomas J. Rueter (Doc. No. 20, No. 01-CV-0086), and Petitioner's Objections to Magistrate Judge's Report and Recommendation (Doc. No. 23, No. 01-CV-0086), it is ORDERED that Lawrence Harper's Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus By A Person In State Custody is DISMISSED. Further, there is no basis for the issuance of a Certificate of Appealability.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge